

**Opinion No. 101.****Witness Fees—Fees, Witness—Counties, Liable for Witness Fees.**

- Held:** 1. Witnesses testifying in proceedings under Chapter 152, of the Code of Civil Procedure, 1935, are entitled to witness fees as provided by Section 4936, Revised Codes of Montana, 1935.
2. The county in which such proceedings are instituted is liable for such witness fees as in other actions or proceedings wherein the county is a party.

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November 29, 1945.

Mr. Edison W. Kent  
County Attorney  
Granite County  
Philipsburg, Montana

Dear Mr. Kent:

You have requested my opinion on the question of whether or not the county is liable for witness fees in proceedings under the provisions of Chapter 152 of the Code of Civil Procedure, 1935, entitled, "Proceedings for the Protection of Dependent and Neglected Children."

Section 4936, Revised Codes of Montana, 1935, provides as follows:

"Witnesses' fees. For attending in any civil or criminal action or proceeding before any court of record, referee, or officer authorized to take depositions, or commissioners to assess damages or otherwise, for each day, three dollars . . ."

It is generally held that proceedings concerning juvenile delinquents and dependent and neglected children, are not of a criminal nature. (86 A. L. R. 1008.) Neither are such proceedings of a civil nature in that there are no adverse parties interested. The state itself is mainly concerned in such proceedings, as is evidenced by the fact that the legislature has quite definitely provided means by which such children may be protected to the end that good government and good citizenship may be promoted.

Chapter 152, *supra*, does not, nor does any other statute, specifically provide for payment of witness fees in proceedings under this chapter. However, Section 10469 authorizes the court to compel the attendance of witnesses on such hearings, and directs the county attorney to appear on behalf of the petitioner. Under the well recognized rule of law that no public official may disperse public funds without specific statutory authority to do so, we must find the authority in some statute.

This office has considered the question of witness fees in special proceedings and has held that authority for payment of witness fees in those instances may be found in Section 4936, *supra*, under the term "proceedings."

In Volume 8, page 413, Report and Official Opinions of the Attorney General, it was held that the filing of a petition for the creation of an irrigation district is not the commencement of an action, but is the commencement of a proceeding, and consequently the clerk of the district court must collect a filing fee of five dollars therefor. In Volume 12, page 175, Report and Official Opinions of the Attorney General, it was held that witnesses attending a coroner's inquest under subpoena issued by the coroner are entitled to witness fees. And in Volume 20, Opinion No. 187, Report and Official Opinions of the Attorney General, it was held that a sanity hearing is a special proceeding which comes within the meaning of this term in Section 4936, authorizing the payment of witness fees.

Our Supreme Court in the case of *State ex rel. Carleton v. District Court*, 33 Mont. 138. 142. 82 Pac. 789, defined the term "proceeding" as follows:

"The term 'proceedings' as ordinarily used, is generic in meaning and

broad enough to include all methods of invoking the action of courts, whether controversies properly termed 'actions' or 'special proceedings' as distinguished from them..."

And in the case of *State v. Northern Pacific Ry. Co., et al.*, 88 Mont. 529, 550, 295 Pac. 257, the court said:

"The word 'proceeding' means special proceedings provided for by statute . . . and includes every application to a court for a judicial remedy not comprehended in the term 'action.'"

The proceedings under Chapter 152, *supra*, certainly cannot be termed actions as that term is generally used. The examination and hearing provided for in such proceedings is strictly judicial in character. The petition inaugurating the proceeding is clearly an "application for a judicial remedy not comprehended in the term action," and is a proceeding within the meaning of the term as used in Section 4936, Revised Codes of Montana, 1935, entitling the witnesses to fees. Insofar as the right to witness fees is concerned, it is immaterial whether the proceeding is criminal or civil.

Having determined that witnesses in such proceedings are entitled to fees, the question then arises as to who is liable for the payment of such fees. As pointed out, the proceedings are not civil in the sense that there are adverse parties. The statute does not specifically provide for the payment of such fees or of costs in such proceedings.

It may be noted that under Section 10467, Revised Codes of Montana, 1935, as amended by Chapter 145, Laws of 1943, the petition may be filed by "any officer of the state department of public welfare, or any person who is a resident of the county . . ."

Under the provision of Section 9810, Revised Codes of Montana, 1935, neither the state nor subdivision thereof, nor any officer prosecuting or defending an action on behalf thereof, is required to pay or deposit any fee or amount to or with any officer during the prosecution or defense of an action. The section further provides that no officer so prosecuting or defending shall be taxed with costs or damages but such costs or damages shall be

taxed to the state or county, as the case may be.

The public welfare statutes make no provision for the payment of witness fees or costs in such proceedings as the instant one. However, Chapter 145, Laws of 1943, provides that the county shall pay one-half the costs of maintaining the child in a foster home, if such is ordered by the court, and the State Department of Public Welfare shall pay one-half. It is reasonable to assume that the legislature knew that costs would be incurred in such proceedings and must be paid. Knowing this, is it not reasonable to assume that the legislature considered the provisions of Section 9810, *supra*, applicable in such proceedings? If the petition be filed by a resident of the county, it cannot be said that such resident would be liable for the costs. Keeping in mind that society itself is mainly concerned in such proceedings, would not the county, in such instance, be liable for costs? And this, especially in view of the provisions of Section 10469, Revised Codes of Montana, 1935, authorizing the court to compel the attendance of witnesses and making it the duty of the county attorney to appear and represent the petitioner. The officer of the State Department of Public Welfare in filing the petition and prosecuting the proceedings is representing the county in which instituted and the county is therefore liable for the costs, including witness fees.

It is therefore my opinion that witnesses testifying in proceedings under Chapter 152 of the Code of Civil Procedure, 1935, are entitled to witness fees as provided by Section 4936, Revised Codes of Montana, 1935, and the county in which such proceedings are instituted is liable for such witness fees as in other actions or proceedings wherein the county is a party.

Sincerely yours,  
R. V. BOTTOMLY,  
Attorney General